Supreme Court, U.S.
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No. 99-1009

In The
Supreme Court of the United States

SUE HARRIS DEBAUCHE,

Petitioner,

v.

VIRGINIA COMMONWEALTH UNIVERSITY, a corporation established pursuant to Virginia Code §23-50.4 and an instrumentality of the Commonwealth of Virginia; EUGENE P. TRANI, individually and in his official capacity as President of Virginia Commonwealth University; LAWRENCE DOUGLAS WILDER, in his individual capacity; CLEAR CHANNEL RADIO, INC., t/a WRVA, a Nevada corporation and CENTRAL VIRGINIA EDUCATIONAL TELECOMMUNICATIONS, INC., t/a WNVT, a Virginia corporation.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Appellate Court appropriately uphold the District Court's ruling dismissing this action against Wilder under Rule 12(b)(6) of the Federal Rules of Civil Procedure for Petitioner's failure to state a claim upon which recovery is allowed by law?

2. Did the Appellate Court err in remanding to the District Court further consideration of the decision to award Wilder attorneys' fees incurred in the defense of Petitioner's meritless action against Wilder as a private party for alleged violation of her constitutional and civil rights?

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STATEMENT OF THE CASE

This case involves a private citizen, Wilder, who in April 1997, in his private individual capacity, invited Mssrs. Donald S. Beyer (hereinafter referred to as "Beyer") and James G. Gilmore (hereinafter referred to as "Gilmore") to join in a debate. (Am. Compl. ¶¶ 25,27, A 89). As of April, 1997, Gilmore and Beyer were the only duly qualified candidates for Governor. Gilmore and Beyer, on October 6th, 1997, debated in a one-time event which came to be known as Debate Virginia. (Am. Compl. ¶ 51, A 97). As to the core decision at issue in this case, the question of invitees, Wilder alone arranged the content of Debate Virginia (Am. Compl. ¶25, A 89). As the sole private invitor and in this individual and personal capacity, Wilder exercised sole discretion regarding the content of the program, namely the identity of the participants. Such decision making regarding choice of speakers was well within Wilder's constitutional prerogative.

Months before Petitioner qualified as the Reform Party candidate, Wilder, acting alone and in his individual capacity, secured basic arrangements regarding the debate with Gilmore and Beyer. (Am. Compl. ¶¶ 24(a) and 25, A 88-89). The agreement between Wilder and Gilmore and Beyer consisted of their commitment to participate in a debate which Wilder would moderate. (Am. Compl. ¶9, A 84) However, the debate had to occur "live" and on a Monday evening between 8:00 and 10:00 p.m. because that was the time slot for Wilder's WRVA radio broadcast. (Am. Comp. ¶ 25, A 89). Having extended invitations to and having secured acceptances from Beyer and Gilmore, Wilder considered other venues for his debate. VCU offered to furnish its facilities and support. (Am. Compl. ¶27, A 89).

In September 1997, DeBauche was certified as the Reform Party candidate for Governor. (Am. Complaint ¶ 19, A 87). Subsequent to that certification, DeBauche alleges that she or persons acting on her behalf attempted to contact

Wilder so as to participate in Debate Virginia. (Am. Compl. ¶¶ 47, 48, 49 and 50, A 96).

There is no allegation that Wilder received Petitioner's communications. There is no allegation that Wilder or anyone else rejected Petitioner's efforts to participate in Debate Virginia. Petitioner merely alleges that Wilder did not return her calls or respond to her alleged requests. (Am. Compl. ¶¶ 47, 48, 49 and 50, A 96). In addition, there are no factual allegations to support Petitioner's allegation of Wilder's alleged intent to exclude Petitioner from Debate Virginia on the basis of her "viewpoint". There are no factual allegations beyond conclusory allegations concerning Wilder's policy, custom and/or practice regarding the regulation of access to, and expression in, designated public fora. Finally, there are no factual allegations in support of Petitioner's contention that Wilder acted under color of state law when he made the deicision regarding the participants in Debate Virginia.

At the District Court level, all parties filed Motions to Dismiss pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure (the "Rules").[1] The District Court granted the motions and dismissed Petitioner's action in its entirety. Petitioner appealed the decision. In a separate Order, the District Court awarded attorneys' fees to Wilder, CVTEC and Clear Channel Communications. This ruling was appealed separately. Both appeals were consolidated before the Fourth Circuit. The Fourth Circuit affirmed the decision on the merits and remanded only the issue of attorneys fees to the District Court for future findings. A 24.

[1] Wilder also filed a Motion for Summary Judgment pursuant to the provisions of Rule 56, but this motion was determined by the District Court to be moot.

ARGUMENT

Reasons for Denying the Writ

First, the District Court's ruling, affirmed by the Fourth Circuit Court of Appeals (the "Fourth Circuit"), that the action brought by Petitioner against the Respondents does not state a claim upon which, as a matter of law, relief can be granted was correct as a matter of law. The position taken by Petitioner does not present this Court with any issues not already decided in Arkansas Educational Television Commission v. Forbes 523 U.S. 666, 118 S. Ct. 1633; 140 L. Ed. 2d 875 (1998). Finally, both the Fourth Circuit and the District Court correctly assessed the factual allegations of Petitioner's amended complaint and determined, despite conclusory allegations to the contrary, that Petitioner did not and cannot plead a cause of action against Wilder, or any other party to this lawsuit. The Petition does not meet the standards set forth in Rule 10 for granting a writ of certiorari because there is no indication of a conflict between the Circuits on an issue of federal or important law, nor is there an indication that the Fourth Circuit failed to correctly apply current law to the facts presented.

Wilder did not seek imposition of attorneys' fees under 42 USC § 1988 against any person other than the Peitioner. Accordingly, Wilder does not take a position on the issue of the Court's finding that such fees may be imposed against the Petitioner's *pro bono* civil rights counsel. Wilder asserts only that this matter should be remanded to the District Court for findings consistent with the Fourth Circuit's opinion on the issue of attorneys fees.

I. THIS PETITION DOES NOT RAISE ANY SIGNIFICANT LEGAL ISSUES NOT PREVIOUSLY DETERMINED BY THIS COURT

Petitioner argues that this is a matter which should be addressed by this court because this is an election year and "because candidate debates are of exceptional significance in the electoral process." Petition for Writ of Certiorari, p. 5. This, however, is exactly why this Court need not address this matter further, as all the issues raised by Petitioner, relevant to candidate debates, those of viewpoint discrimination and access to a public forum, have been previously decided by this Court.

Petitioner describes her case as one which must be decided in light of this Court's ruling in the case of Arkansas Educational Television Commission v. Forbes 523 U.S. 666, 118 S. Ct. 1633; 140 L. Ed. 2d 875 (1998). In light of that characterization, it is Wilder's position that Petitioner's case raises no legal issues not previously decided by this Court with regard to viewpoint discrimination and access to a public forum. In Forbes, this Court determined that the First Amendment of its own force does not compel public broadcasters to allow access to their programming. Further, in Forbes, it was the broadcaster, a state created agency, who was the defendant. None of these decisive factors exist in this case. Further, in Forbes, none of the participants in the debate, the moderator or any of the questioners, were sued. Petitioner is asking this Court, which applied essential principles of Freedom of Speech to a state owned agency in Forbes, to create state action where it does not exist. Forbes neither stands for nor implies the proposition that because candidate debates are important, they rise to the level of state action, which is the only way Petitioner's allegations against Wilder survive any reasonable scrutiny.

II. BOTH THE DISTRICT COURT AND THE FOURTH CIRCUIT WERE CORRECT IN DISMISSING THE PETITIONER'S ACTION AGAINST RESPONDENT WILDER AS THERE WERE NO FACTUAL ASSERTIONS OF STATE ACTION BY WILDER, ONLY CONCLUSORY ALLEGATIONS

In ruling on a motion to dismiss under Rule 12(b)(6) of the Rules, the court need not accept the truth of conclusory allegations of fact. In its consideration of the District Court's ruling dismissing this matter, the Fourth Circuit detailed all the factual allegations of Petitioner's First Amended Complaint. After this analysis, the Fourth Circuit affirmed the ruling of the District Court. In so ruling, the Fourth Circuit stated:

> However th[e] facts [of the first amended complaint] are characterized, the arrangement described between the state actors and private actors does not transform the private actors' conduct into state action. As distinguished from *Burton*, DeBauche's amended complaint does not describe facts that suggest independence such that VCU relied on the private defendants for its continued viability. While the state actors, VCU and Trani, worked with Wilder in the organization and promotion of the debate, their conduct cannot be thought to have controlled his conduct to such an extent that his conduct amounted to a surrogacy for state action. Moreover, they did not control the stations which only agreed to broadcast the debate. More pertinently, when we apply *Andrews* to those facts, we conclude that none of the four circumstances that we identified in *Andrews* exists in this case.

DeBauche v. Virginia Commonwealth University, et al, 191 F. 3d 499, ___. A 15-16. [2]

A motion to dismiss should be granted if it appears to a certainty that no relief could be granted under any set of facts which could be proved. However, the court need not credit a complaint's bald assertions or legal conclusions when deciding a motion to dismiss. Morse v. Lower Merion School District, 132 F. 3d 902 (3d. Cir. 1997).

The case of Hirsch v. Arthur Anderson, 72 F.3d 1085, 1092, (2d Cir., 1995) held that "conclusory allegations of the legal status of defendant's acts need not be accepted as true for the purposes of ruling on a motion to dismiss." The Hirsch court went on to analyze the factual allegations and underpinnings of the claims made and found that the allegations, despite stated legal conclusions by the claimant otherwise, were not sufficient to state a cause of action. This is exactly what both the District Court and the Fourth Circuit did in this present situation. After a detailed analysis of the factual allegations and underpinnings of Petitioner's Amended Complaint, each of these Courts found that there was a fundamental flaw in the allegations against Wilder. Wilder was not, at the time of the conduct complained of in the Amended Complaint, a state actor and therefore, he could not, as a matter of law, violate the Petitioner's constitutional rights, including those rights described in the Forbes decision, under which Petitioner stakes her entire claim.

An analysis of Petitioner's Amended Complaint reveals that the paragraphs specifically naming Wilder state only that (1) Wilder was an influential figure in Virginia politics; (2) Wilder hosted a talk show on a local radio station; (3) Wilder invited Gilmore and Beyer to discuss issues on that show; (4) Wilder accepted the invitation of VCU to conduct a debate between Gilmore and Beyer on VCU premises; and (5) Wilder failed to return phone calls

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[2] Andrews v. Federal Home Loan Bank of Atlanta, 998 F.2d 214, 217 (4th Cir. 1993)

and e-mail messages from DeBauche. (Am. Compl. ¶¶ 9, 18, 19, 24(a), 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 37, 46, 47, 48, 49, 50, 82, 83, 84, 94, 95, 96, 97, and 98; A 83,86,96-96,103-106). Armed only with these sparse factual allegations, Petitioner then jumps to the legal conclusion that Wilder acted "jointly" with VCU and all the other respondents and, in so doing, violated Petitioner's alleged constitutional right to participate in Debate Virginia.

The law does not require the District Court or this Court to accept as true these conclusory legal assertions, even while accepting the factual allegations as true for the purposes of notice pleading. Petitioner's claim against Wilder fails as a matter of law as is does not make factual allegations sufficient to support the legal conclusions drawn. Because Petitioner's Amended Complaint fails to state any factual basis for her allegation that Wilder acted "jointly" with the VCU, the District Court and the Fourth Circuit rightfully rejected her legal conclusion that Wilder was a state actor and, thus, could be held liable for any alleged violation of her civil or constitutional rights.

III. AS A PRIVATE PARTY WILDER CANNOT BE LIABLE FOR A VIOLATION OF DEBAUCHE'S CONSTITUTIONAL RIGHTS

In the Amended Complaint, Petitioner states a claim against Wilder in his individual capacity only. Although reference is made in Petitioner's brief to Wilder acting in his capacity as an independent contractor of WRVA and in his capacity as a Distinguished Professor at VCU, Wilder was

not sued in either capacity.[3] At the time Petitioner filed the Amended Complaint, she had all of this information. Nonetheless, the Complaint and the Amended Complaint are identical in their statements of the capacity in which Wilder is sued. The only contention by Petitioner that Wilder was a state actor is her conclusory allegation that Wilder acted jointly with all of the defendants, state actors and private corporations alike, in failing to invite Petitioner to participate in Debate Virginia and failing to return phone calls and other purported communications.

This Court has articulated several tests for establishing state action by a private party. See Lugar v. Edmondson Oil Co., 457 U.S. 922 ; 102 S.Ct. 2744; 73 L. Ed. 2d 482(1982). For a private party to be liable under the "joint action" test, the state must have "so far insinuated itself into a position of interdependence with the private party that it was a joint participant in the enterprise". Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357-58; 95 S. Ct. 449; 42 L.Ed.2d 477 (1974). The state and the private party must be "intertwined in a 'symbiotic relationship'" involving the alleged constitutional violation. National Broadcasting Co. v. Communications Workers of

[3] If the Petitioner is asserting that the actions taken by Wilder were in his role as a Distinguished Professor of the Center for Public Policy at VCU, then Wilder is entitled to the broad protections of academic freedoms. See Sweezy v. New Hampshire, 354 U.S. 234, 250; 77 S.Ct. 1203, 1211 (1957) in which the court stated "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." See also Keyishian v. The Board of Regents of the University of the State of New York 385 U.S. 589, 87 S.Ct. 675 (1966) in which the court stated "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."

America, 860 F.2d 1022, 1027 (11th Cir. 1988) (quoting Jackson, 419 U.S. at 357).

As stated above, the Fourth Circuit found that Trani,[4] could not be thought, based upon the factual allegations of Petitioner's 100-plus paragraph Amended Complaint, to have controlled Wilder's conduct to such an extent that his actions amounted to a surrogacy for state action. It is this level of control which is required before a party can bring an action against an otherwise private party for violation of Constitutional and Civil Rights.

The Fourth Circuit has held that where there is no "ongoing management and control" of a public facility used by a private party for a one-time event, such "intertwining" will rarely, if ever, be found. UAW, LOCAL 5285 v. Gaston Festivals, 43 F.3d 902, 908 (4th Cir. 1995) (quoting Evans v. Newton, 382 U.S. 296, 301 (1966)) (no state action involved in one-day use of public property for local festival). Petitioner does not point out a conflict in the circuits on this issue. Accordingly, there is no basis for granting the writ.

In the case of Andrews v. Federal Home Loan Bank of Atlanta, 998 F.2d 214, 217 (4th Cir. 1993), the Fourth Circuit articulated a test by which it can be determined whether a private party can be a state actor. The court found that a private party may be held liable for violations of Constitutional and Civil Rights in only four contexts: (1) when the state coerced the private actor to commit acts that would be unconstitutional if done by the state; (2) when the state has sought to evade a clear constitutional duty through delegation to a private actor; (3) when the state has delegated a traditionally and exclusively public function to a private actor; and (4) when the state has committed an unconstitutional act in the course of enforcing a right of a private citizen. The Fourth Circuit having specifically considered the possible applicability of each of these four

[4] Petitioner has not appealed the District Court's ruling dismissing VCU from this action.

situations rejected the Petitioner's position that Wilder's conduct rises to the level of state action allowing her to state a claim against him for the violation of her Constitutional rights.

The allegation that a party is a state actor is a legal conclusion, which a court is not bound to accept in ruling on a motion to dismiss. . See Flagg Bros. v. Drash, 436 U.S. 149; 98 S.Ct. 1729; 56 L. Ed. 2d 185 ; (1978) (in which the Court upheld a district court's dismissal of an action under Rule 12 (b)(6) for failure to state a claim of state action); Koltz v. Bezmen, 822 F. Supp. 114, 117 (E.D.N.Y. 1993) (granting motion to dismiss complaint against private party because only allegations of collaboration with state defendant were "conclusory" vague or general"); Carter v. Norfolk Community Hospital Assoc., Inc., 761 F.2d 970 (4th Cir. 1985) (granting motion to dismiss where private party's conduct did not involve state action). A court may find state action only where there are sufficient specific allegations of fact to permit it to reach that conclusion for itself. Petitioner has failed, even after amending her initial Complaint with a 100- page plus appendix to the Amended Complaint, to substantiate such an allegation.

It is self-evident that "the constitutional guarantee of free speech is a guarantee only against abridgment by government". Hudgens v. NLRB, 424 U.S. 507, 513 (1976); Watts-Mean v. Prince George's Family Crisis Center, 7 F.3d 40 (4th Cir. 1993). The lines drawn by state action "permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law". Edmondson v. Leesville Concrete Co., Inc., 500 U.S. 614, 619 (1991). Neither free speech nor equal protection erect a shield against merely private conduct. Shelley v. Kraemer, 334 U.S. 1, 13 (1948). "Careful adherence to the state action requirement preserves an area of individual freedom by limiting the reach of federal law and avoids the imposition of responsibility on a State for conduct it could not control. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S.

180, 191 (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922 at 936-937).

Wilder did not decide not to include Petitioner in Debate Virginia. The participants in Debate Virginia were determined months before Petitioner was ballot qualified. There are no factual allegations that any of the sate actors named here, or any other state actor, controlled Wilder's conduct such that his actions amounted to a surrogacy for state action or that the state actors insinuated themselves with Wilder's decision as to who would be invited to Debate Virginia. The only allegation that Wilder was in any way a "state actor" is the conclusion that he acted jointly with all of the other defendants, including VCU, each purportedly a state actor for the purposes of Petitioner's claims.

A. If Wilder Is Not A State Actor, He Cannot Be Liable for Violation of DeBauche's Constitutional Rights

The First Amendment does not require speakers who use public property to include in their expressive activities the messages of others. Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557 (1995); Sistrunk v. City of Strongville, 99 F.3d 194 (6th Cir. 1996), *cert denied*, 117 S. Ct. 2409 (1997); United Auto Workers v. Gatson Festivals Inc., 43 F.3d 902 (4th Cir 1995). In the claims against Wilder, the Petitioner is seeking to force Wilder, because he used public property, to associate with Petitioner against his will.

Although the First Amendment guarantees access to public facilities previously designated for expressive activities, it also states that access shall not be denied because the state disagrees with the viewpoint of any speaker or message. In this case, Petitioner was offered equal access to VCU's Performing Arts Center and was offered the same resources that VCU made available to Wilder and Debate Virginia. (JA100-102). Petitioner declined this offer,

insisting that the entire Debate Virginia be re-created for her benefit. It is evident from the nature of this demand that Petitioner sought something far more accommodating than mere nondiscriminatory access to public facilities. Rather, Petitioner sought the right to confront and contemporaneously express her message and to thereby dilute the message of her competitors in the political marketplace of ideas and, further, to force Wilder, a private citizen, to include her message in his presentation.

Petitioner argues that including her in Debate Virginia would have better informed the electorate about its choices; however, an "audience edification test" does not pre-empt the First Amendment nor is "good cause" or "right of reply" a justification for encroachments on private expression. This Court in Forbes did not recognize such a test. Essentially, Petitioner is inviting this Court to carve out a "political debate" exception to Hurley. But political debates are not unlike other kinds of meetings, social gatherings, educational programs or symposia. Debates are simply a formal opportunity for the exchange of ideas. The fact that speakers in a debate may be highly visible or influential individuals does not alter the governing principles of the First Amendment. Politicians seeking public office and private citizens who arrange debates between candidates for public office should not receive diminished First Amendment rights simply because they use public facilities to facilitate such dialogue. Citizens may use university resources to facilitate their own "political parade", yet at the same time, maintain the integrity and clarity of their message and associations. As long as the state permits others to "have their parade" as well, the First Amendment is not offended.

The fact that Petitioner was offered an opportunity to use the same state facilities and resources offered to her competitors, yet could not galvanize any significant popular support even after such resources were made available to her, amply demonstrates that she seeks to draw upon Wilder

and her opponents' visibility to enhance, rather than merely to convey, her message. This "positive associational glow" was precisely what animated the bisexual coalition to seek access to the traditionalist veterans' parade in Boston. The gay rights activists in Hurley, like the Petitioner, sought to be positively associated with the populist message of the Irish parade and to broaden that message within the same expressive medium. That may be a laudable intention, but constitutionally, state intervention to alter another's expression to render that message more acceptable is a "decidedly fatal objective". Hurley, 515 U.S. at 562, 115 S. Ct. at 2350.

B. Only if Wilder Was Acting As A Public Broadcaster As Defined in the Forbes Decision, Could He Be Held Liable for Violation of DeBauche's Constitutional Rights

There is no allegation in Petitioner's pleadings or assertions in her briefs that Wilder was associated with CVETC, the public broadcaster in this action. However, in the arena of "public" broadcasting, this Court addressed this issue in Forbes. In its decision, this Court held that the public television station's viewpoint-neutral decision to not allow a "marginal" candidate to appear on a televised debate passed constitutional muster. This Court went on to discuss the distinction between private and public broadcasters with regard to access. Justice Kennedy, writing on behalf of the majority, stated:

> As a general rule, the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination. Programming decisions would be particularly vulnerable to claims of this type because even principled exclusions

> rooted in sound journalistic judgment can often be characterized as view-point based. . . . Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its cirrocumuli, a broadcaster by its nature will facilitate the expression of some viewpoint instead of others. Were the judiciary to require, and so to define and approve, pre-established criteria for access, it would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion.

Id. at p. 1639.

This is exactly what Petitioner is asking this Court to do. If Wilder was acting jointly with WRVA, a private broadcasting entity, he cannot be held to a higher constitutional standard than that entity. The only way, under Forbes that Wilder could be held liable for the violation of Petitioner's constitutional rights was to be acting as a public broadcaster, under the scenario envisioned by Forbes. This was not the case, is not the case and was not pleaded as being the case. As such, Wilder cannot be liable for the viewpoint discrimination with which the Petitioner charges him and the lower Courts are correct in their evaluation of Petitioner's amended complaint.

C. The Utter Lack of Legal Support for DeBauche's Claims Against Wilder Warrants Payment of Attorneys' Fees and the Decision of the Fourth Circuit to Remand that Issue to the District Court Should be Upheld

Title 42 U.S.C. §1988 states that in a §1983 action, the court in its discretion, may allow the prevailing party…a

reasonable attorney's fee as part of the costs". Citing Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 421 (1978), the District Court construed §1988 to mean that a defendant is entitled to a fee award where the action is "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith".

The lower courts determined that Wilder alone decided to invite only Gilmore and Beyer. The lower courts further determined that Wilder had a First Amendment right to do so and not include Petitioner in Debate Virginia even if the debate occurred on the grounds of a state university. Wilder did not seek a ruling that the attorneys' fees to which he is entitled under 42 U.S.C. § 1988 should be imposed against the Petitioner's counsel. Thus, Wilder did not take a position in the Fourth Circuit Court of Appeals nor does he take position in this Court as to whether the fees should be awarded jointly and severally against Petitioner and her *pro bono* counsel.

Petitioner argues that discovery and a trial should be held in order to determine whether her case is unreasonable or without foundation. However, further discovery by Petitioner cannot elevate her case above the pleadings set forth in her Amended Complaint. Petitioner admits that Wilder acted as a private individual in inviting Beyer and Gilmore to participate in Debate Virginia. Moreover, the lower Courts correctly found that Petitioner failed to allege facts sufficient to demonstrate that Wilder was a state actor. Permitting Petitioner further discovery and a trial cannot cure the deficiencies of Petitioner's Amended Complaint. The only result of additional discovery and trial is the needless increase to the defendants in attorneys' fees and costs of which Petitioner already complains to be unreasonable.

The issue before this Court is not whether Petitioner *can* bring a claim of viewpoint discrimination but whether both lower courts were correct in its ruling that she failed to

allege properly a case of viewpoint discrimination, even after the opportunity to amend the complaint was taken subsequent to obtaining campaign documents. Insofar as Petitioner failed to set forth a reasonable claim against *any* of the defendants and to the extent she seeks to intrude upon Wilder's First Amendment rights, she should be responsible for Wilder's attorneys' fees and costs.[5]

CONCLUSION

Respondent Lawrence Douglas Wilder respectfully requests that this Court deny Petitioner's request for a Writ of Certiorari and that this matter be remanded to the District Court on the issue of attorneys' fee for findings consistent with the ruling of the Fourth Circuit Court of Appeals.

Respectfully submitted
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[5] The Petitioner alleges that Wilder is not entitled to attorneys fees under 42 USC § 1988 because she was unaware of Wilder's motion. to dismiss or in the alternative for summary judgment. However, this issue was raised by the Petitioner at the appellate level and rejected.